

H8BAASIMC

Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 CR 172 (JSR)

5 EARL SIMMONS a/k/a "DMX",

6 Defendant.

7 -----x

8 New York, N.Y.  
9 August 11, 2017  
11:15 a.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13  
14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
17 Southern District of New York  
18 RICHARD COOPER  
19 Assistant United States Attorney

20 THE LAW OFFICES OF MURRAY RICHMAN  
21 Attorneys for Defendant Simmons  
22 MURRAY RICHMAN  
23 STACEY RICHMAN  
24  
25

1 (Case called)

2 MR. COOPER: Good morning, your Honor.

3 Richard Cooper, for the government. With me at  
4 counsel table is U.S. Pretrial Services Officer John Moscado.

5 THE COURT: Good morning.

6 MR. RICHMAN: Murry Richman, for the defendant. And  
7 assisted by --

8 MS. RICHMAN: Stacey Richman, your Honor. Pleasure to  
9 see you.

10 THE COURT: Good morning.

11 Where is your client?

12 MR. RICHMAN: My client is on the highway, your Honor.  
13 I just spoke with him. He is on the Westside Highway coming  
14 down with four people who are driving him down. Very sorry  
15 about this tardiness but we had spoken yesterday and he assured  
16 me he would be here at 10:30 this morning although it was  
17 scheduled for 11:00.

18 THE COURT: Yes. And I purposely took another short  
19 matter first.

20 MR. RICHMAN: I know that.

21 THE COURT: So it's now 11:15. He can't have made  
22 much effort to be on time if he's not even here by 11:15.

23 MR. RICHMAN: Your Honor, he's not in charge of his  
24 own movements sometimes. I had spoken with him late last  
25 night. He assured me that he would be here this morning by

1 10:30. I spoke with him again this morning. He again assured  
2 me that he would be down here. I spoke with him not 12 minutes  
3 ago. They were on the Westside Highway. According to the  
4 estimated time of arrival, according to the GPS it was 11:32.  
5 So I could only request additional time. I will try my best to  
6 get him here on time.

7 THE COURT: Let me ask you, Mr. and Ms. Richman, have  
8 you seen the report that the Pretrial Services officer sent to  
9 this Court on August 9?

10 MR. RICHMAN: I have.

11 THE COURT: OK. All right. We will reconvene whether  
12 your client is here or not at 11:40.

13 MS. RICHMAN: Thank you, your Honor.

14 MR. RICHMAN: Thank you, your Honor.

15 (Recess)

16 (Case Recalled)

17 MR. COOPER: Good morning, your Honor.

18 Richard Cooper, for the government. With me at  
19 counsel table is U.S. Pretrial Services Officer John Moscado.

20 THE COURT: Good morning.

21 MR. RICHMAN: Good morning, your Honor.

22 Murray Richman, on behalf of the defendant. Assisted  
23 by --

24 MS. RICHMAN: Stacey Richman.

25 Good morning, your Honor.

1 THE COURT: Good morning.

2 MR. RICHMAN: Mr. Simmons is present in court, your  
3 Honor, with his apologies. He started out, he lives in  
4 Westchester County. As a result of coming down, other people  
5 driving, he came down and took a circuitous route and got here  
6 late and I must apologize to the Court.

7 THE COURT: All right. So we're here because of  
8 numerous alleged bail violations by the defendant.

9 The Court received two submissions. One was a letter  
10 dated August 9, 2017, from the government that indicated that  
11 even though the defendant was released subject to obtaining  
12 co-signatures on his bond which the first was to be obtained  
13 originally by July 14 and that was extended several times until  
14 July 20 but in fact, no co-signer was ever obtained.

15 Secondly, the government advised that the defendant  
16 had traveled to St. Louis without permission.

17 On August 9 the Court also received a memorandum from  
18 the Pretrial Services officer. I'll read some of the pertinent  
19 parts.

20 On July 17, 2017, Pretrial Services met with the  
21 defendant and the conditions of bail were reviewed. On the  
22 same date a drug test was administered which proved positive  
23 for cocaine.

24 At the defendant's request he was instructed to report  
25 to Pretrial Services in White Plains on July 20 at two p.m.

1 However, he failed to report as directed.

2 On July 21 the defendant met with Pretrial Services.  
3 Pretrial Services offered the defendant drug treatment options  
4 but he indicated he can stay drug free on his own and does not  
5 need treatment. On that date Pretrial Services administered a  
6 drug test which proved positive for cocaine.

7 The defendant was instructed to report again in-person  
8 on July 24. On July 24 Pretrial Services contacted the  
9 defendant via telephone and he stated he was in Chicago.  
10 Pretrial Services inquired if the Court gave him permission to  
11 travel there. The defendant stated that it was discussed in  
12 court and that the Court had given permission for him to  
13 travel.

14 Let me pause there to recite what in fact was said in  
15 court. This is from the transcript of the hearing before this  
16 Court on July 17. After Mr. Richman had raised the question of  
17 Mr. Simmons' travel the Court stated:

18 "If you both agree, meaning the government and the  
19 defense, and the Pretrial Services officers agree, you don't  
20 even have to run it by me. But if there is any disagreement on  
21 the part of anyone, then of course, you need to bring it to my  
22 attention."

23 It's clear from what I just read that this trip to  
24 Chicago was not brought to the attention of the Pretrial  
25 Services officer in advance and I have no indication that it

1 was brought to the attention of the government or that the  
2 government had issued its approval.

3           Going back to the memo from Pretrial Services.

4           The defendant reported in person on July 26. A drug  
5 test was administered and the results were positive for  
6 marijuana, cocaine and opiates. Pretrial Services confronted  
7 the defendant about the results of the drug screening and he  
8 denied drug use. However, he indicated that he had an opiates  
9 prescription as a result of an injury he sustained while  
10 performing in Chicago. The defendant provided a copy of such  
11 prescription to Pretrial Services.

12           On July 28, 2017, Pretrial Services instructed the  
13 defendant to remain in his residence on July 31 as Pretrial  
14 Services would be visiting him at home.

15           On July 29 the defendant left a telephone message  
16 indicating that he was traveling to St. Louis as he had a  
17 family emergency. The defendant returned to New York on  
18 August 3. It should be noted that neither the government, nor  
19 our office, that is, the Pretrial Services Office, gave the  
20 defendant permission to travel out of the district.

21           Skipping ahead, the defendant last reported to our  
22 office on August 7. On that day the defendant was drug tested  
23 and the results were positive for cocaine, marijuana and  
24 opiates.

25           So if those allegations are true then it would appear

1 that Mr. Simmons has violated the terms of his Pretrial release  
2 not once, not twice but many times, probably more times than I  
3 can ever remember a defendant having violated the terms of his  
4 Pretrial Services release in such a short period. This gives  
5 the Court very little confidence that he should be released at  
6 all.

7 But let me hear from defense counsel.

8 MR. RICHMAN: Your Honor, I've worked with Mr. Simmons  
9 for the past 25 years. He's always appeared in the various  
10 cases that he's been involved in. There's been various cases.  
11 Most of them quite minor.

12 THE COURT: Yes. He has an extensive rap sheet,  
13 mostly for minor matters but not all. I was looking at that.  
14 For example, he was found guilty or pled guilty in 2002 to  
15 possession with intent to distribute drugs. Now, it wasn't  
16 that major an offense. He was given probation. He was also  
17 found guilty on March 15, 2002, of lawful possession of a  
18 weapon, namely, a handgun. He was found guilty on December 19,  
19 2002, of attempted criminal possession of a weapon. There were  
20 enumerable minor offenses. He was in 2004 convicted upon a  
21 plea of guilty to operating a motor vehicle while impaired by  
22 drugs. He was convicted in 2008 of possession of a loaded  
23 firearm and he was convicted in January 2009 of narcotics and  
24 drugs possession.

25 He was convicted in 2008 of, appears it was likely

1 possession of cocaine. He was convicted of in 2011 of what's  
2 marked as aggravated unlicensed operation of a motor vehicle.  
3 It's unclear what was involved there. The charge but not the  
4 plea was a charge of criminal possession of a loaded firearm  
5 and criminal possession of a controlled substance. He was  
6 convicted in various times before and after of various other  
7 less significant offenses.

8 So, yes, he doesn't have a rap sheet that indicates  
9 major felony convictions. He does have a rap sheet that at  
10 least suggests more than a passing acquaintance with illegal  
11 drugs and more than a passing acquaintance with handguns.

12 But I interrupted you. Go ahead.

13 MR. RICHMAN: Your Honor, you can always interrupt me.  
14 I have no standing here.

15 Most respectfully, I've known Mr. Simmons 25 years.  
16 Yes, all of those things are true. All of those things have  
17 been as a result of his problem with substance --

18 THE COURT: Which, here I go again. Forgive me  
19 again -- which he told Pretrial Services he had under control  
20 and could handle on his own.

21 MR. RICHMAN: You know --

22 THE COURT: It sounds like total self-denial.

23 MR. RICHMAN: So much of life is self-denial. So much  
24 of us will go through all our lives is self-denial. He is no  
25 different than the rest of us in that particular area. I



1 recognize that. I've known him. When I'm sitting there and  
2 rationalizing and working with him, he is a very rational and  
3 decent human being, surprisingly intelligent and concerning. I  
4 sometimes feel that if placed in custody would just destroy  
5 everything here. We couldn't properly prepare this case. He  
6 could properly handle this case. There would be no way. You  
7 know, I sometimes feel that judges who put people in jail in  
8 terms of anticipation of going to trial or facing the before  
9 trial don't realize the burden that's on the defense, on the  
10 ability to actually prepare this case.

11 Mr. Simmons is a decent human being who is caught up  
12 with a problem. I think there are circumstances that can be  
13 adequately provided to keep him out, to keep him performing,  
14 keep him earning, keep him supporting his numerous children  
15 that he's had and at the same time give him some support in  
16 terms of his drug problem. It's a problem that he says he's  
17 gotten under control. We know better. We hope better. He  
18 tells us that it's all as a result of prior use prior to his  
19 arrest. It takes 30 days to get out of his system. I really  
20 don't know enough about it but I do know to the extent that he  
21 does need help. I've spoken with the Pretrial Services officer  
22 who has suggested a program can be interspaced with the ability  
23 for him to perform and at the same time going to the outpatient  
24 program and working closer with the Pretrial Services program.

25 As for, incarceration would only just wreck the entire

1 structure of family support and direct devastation on the  
2 children that he has in his family that he has to support.

3 THE COURT: What was this supposed family emergency?

4 MR. RICHMAN: I have no problem discussing the family  
5 emergency in camera with your Honor but I think it really  
6 should not be done for public record and it's a personal family  
7 difficulty. It involves the woman he is with now, his fiance  
8 who comes from St. Louis that --

9 THE COURT: All right. You don't have to give me more  
10 details at this point.

11 Let me hear from the government.

12 MR. COOPER: Your Honor, we had prior to the  
13 defendant's presentment and arraignment background concerns  
14 about his ability to comply with conditions giving, as your  
15 Honor cited, the history here, the rap sheet and the nature of  
16 this crime which involved, essentially, a scheme to conceal and  
17 to go off the radar and lead an entirely cash lifestyle, as we  
18 allege in part to avoid complying with his tax obligations.  
19 Over those background concerns, the fact that he surrendered  
20 when notified that there were charges pending against him  
21 certainly went a long way for us in speaking with Mr. Richman  
22 and agreeing to propose to the Court a condition, a set of  
23 conditions for bail.

24 The violations are very troubling. Just as troubling  
25 as the substance abuse is to us is leaving the district without

1 getting permission from Pretrial and from the government which  
2 to the extent there's no justification for that, it raises  
3 serious concerns about his ability to comply.

4 To be clear, the concern about risk of flight is  
5 not --

6 THE COURT: He did it twice. One time saying that it  
7 was a family emergency and that it took precedent over even  
8 having to call you or Pretrial Services which would have taken  
9 maybe two minutes of his time to seek permission but he didn't  
10 do that. And the other time claiming, as the Court record  
11 contradicts, that he had received permission from this Court.  
12 So in addition, it sounds like he's a liar.

13 MR. COOPER: Your Honor, all of those things are  
14 troubling and that in part motivated our desire for the Court  
15 to impose more restrictive conditions on the defendant because  
16 he's shown an inability to comply.

17 And the only other point I would make to your Honor is  
18 our concern about risk of flight is not only that he is going  
19 to essentially take off and go on the lamb and we won't be able  
20 to find him, but it's that by failing to comply it imposes a  
21 burden on everybody, on the government in the event he misses a  
22 court conference and we have to obtain a warrant and  
23 potentially work with the marshals and with law enforcement  
24 agencies to go out and locate him and to bring him to court.  
25 It imposes --

1 THE COURT: My heart doesn't exactly bleed for your  
2 having to do that. The government does that all the time.

3 MR. COOPER: Well, that's true, your Honor, but it's  
4 certainly, the point is that risk of flight is not only  
5 fleeing, going on the lamb. It's risk of nonappearance in the  
6 court and having to compel or otherwise take additional steps  
7 to obtain --

8 THE COURT: Why appear in court when you're stuck on  
9 the Westside Highway?

10 MR. COOPER: The other point, your Honor, is it also  
11 imposes significant additional burdens on the Pretrial Services  
12 agency to have to chase after the defendant and attempt to  
13 ensure his compliance with conditions. Those are all the  
14 factors motivating our request that the Court impose more  
15 restrictive conditions on the defendant.

16 THE COURT: So let me ask Mr. Richman, if instead of  
17 detaining him at a known address, namely, the local jail, I  
18 were to impose home confinement subject to certain limitations,  
19 where would that be?

20 MR. RICHMAN: It would be in Westchester County.

21 THE COURT: What's the address?

22 MR. RICHMAN: Your Honor, most respectfully, I would  
23 give it to the Court without hesitation. If it becomes public  
24 we'll be bombarded with thousands of people.

25 THE COURT: All right. Well, what I want to know is

1 this, this is a home or an apartment? What is it?

2 MR. RICHMAN: A house, your Honor.

3 THE COURT: How long has he been there?

4 MR. RICHMAN: Over a year, your Honor.

5 THE COURT: Is he the owner?

6 MR. RICHMAN: No, he's not. He rents the house.

7 THE COURT: How long is the lease?

8 MR. RICHMAN: He has another year, your Honor,  
9 two-year lease. I'm preparing the address for you in camera.

10 THE COURT: Yes.

11 MR. RICHMAN: One of the problems we have is just to  
12 flesh out for the record, the U.S. Attorney's Office has been  
13 directing -- to be quite candid with you, I have no argument at  
14 all with the prosecution. They have been reasonable. We've  
15 worked together. We've spoken together. I've spoken to him  
16 more than I even speak to my client. And when we received the  
17 call at two o'clock in the afternoon to produce my client,  
18 within two and a half hours I had my client down here and in  
19 the courthouse. We couldn't arraign him that day because the  
20 magistrate had left the building at that time. We had him held  
21 over the next day and arraigned him the following morning with  
22 no difficulty at all. He was produced.

23 May I just approach and give you this?

24 THE COURT: Yes.

25 (Pause)

1           MR. RICHMAN: He's producing records at the present  
2 time. He goes out and does his music. His music is done  
3 usually in the evenings when they go to the studio with his  
4 group and the people who are supporting him. They do music and  
5 they have shows periodically. We gave a list of the shows on  
6 several occasions to the prosecution. The prosecution told me  
7 just prepare the list in advance and which I'm in the process  
8 of doing. On the day of the arraignment I had that list with  
9 me and he said just send it to me. And that list really  
10 anticipates September, October and November for the shows that  
11 he is going to be performing. He's booked for those shows. He  
12 will be working in that capacity subject to the Court's  
13 approval, obviously.

14           But I think he has learned his lesson. I think he has  
15 learned --

16           THE COURT: You know, I wonder a little bit about that  
17 because thanks to your typically superlative efforts, he has  
18 largely escaped any jail time or prison time despite this very  
19 extensive rap sheet and so I wonder whether he really has  
20 learned any lesson. The lesson he seems to have learned as  
21 illustrated by his behavior over the last few weeks is that he  
22 is free to thumb his nose at the Court and at the Pretrial  
23 Services because his experience is that Murray Richman will  
24 always get him off. That seems to be the only lesson he's  
25 learned.

1           MR. RICHMAN: Your Honor, I'm flattered with the  
2 suggestion. I would suggest to you there may be other reasons  
3 here. I'm going to -- and I suggest to the U.S. attorney that  
4 there may be some medical reasons involved which I will be  
5 submitting to the Court by way of a written report that once  
6 you review the report you may understand what the problem may  
7 actually be. I don't want to take full credit. While it's  
8 flattering, this is a substance person here, a very good  
9 person. And I would ask that the Court, you've understood the  
10 burden. He's tried to comply. He doesn't really deserve the  
11 consideration but I'm asking for the consideration,  
12 nevertheless.

13           The Pretrial Services officer has been terrific. We  
14 have been in communication. I wish they would also be in  
15 communication with him to the same degree that I can  
16 communicate with him. Maybe I should just be adding to the mix  
17 that when they call him, just to call me and I'll make those  
18 things happen. It seems that sometimes it's difficult for them  
19 to get things through his head but it gets through his head and  
20 that's one of the things I want to submit to you as the reason  
21 why it may not be able to get through his head.

22           THE COURT: Well, I'm going to not detain him in jail.  
23 Although, I think a very strong argument could be made for  
24 detaining him in jail.

25           The reason I'm not is first, I think you're quite

1 right, Mr. Richman, that a case of this sort, a relatively  
2 complicated and complex case is not one one can easily prepare  
3 if your client is in jail. So I think that weighs heavenly in  
4 the balance.

5 I also think that we are often much to quick in this  
6 country to lock people up before trial, not to mention after  
7 trial. And while he certainly had made one of the better cases  
8 for locking himself up, I think one has to look at the broader  
9 picture.

10 The really broader picture is that I think there is a  
11 set of conditions that will assure his reappearance in court  
12 and that is the real bottom line under our Constitution. Our  
13 Constitution says that if there are reasonable bases for  
14 assuring the reappearance of a defendant prior to trial, that  
15 trumps all the other factors and that's what weighs in the end  
16 most heavily with this Court.

17 So he is going to be starting immediately, that is to  
18 say, as soon as he can get back home today, subject to home  
19 confinement seven days a week, 24 hours a day, except upon  
20 further expressed permission of the Court, not Pretrial  
21 Services, not the government, though I will want them to be  
22 notified and I will have input from them. But only if I agree  
23 to his release in advance can he even go outside to water the  
24 lawn.

25 In terms of his drug problem which is gross, Pretrial



1 Services will arrange an appropriate drug treatment program and  
2 submit it to the Court for the Court's approval.

3 In terms of travel for any reason, family emergency,  
4 business, whatever, I'm not going to approve anything that  
5 isn't submitted to me at least a week in advance.

6 In terms of medical situation, Mr. Richman, you'll  
7 submit what you want to submit and I'll deal with that.

8 MR. RICHMAN: Yes, your Honor.

9 THE COURT: In terms of a co-signer signing a bond,  
10 I'm going to eliminate that condition. I think that is just  
11 unnecessary given the home confinement.

12 All the standard conditions will apply. No possession  
13 of guns, no use of drugs, et cetera, all of the standard  
14 conditions. All right?

15 MR. RICHMAN: Respectfully, one further?

16 THE COURT: Yes.

17 MR. RICHMAN: Counsel visits, working with counsel and  
18 reviewing materials from the court for the preparation of  
19 trial --

20 THE COURT: Yes.

21 MR. RICHMAN: -- will we have to notify the Court in  
22 advance when he is coming to my office?

23 THE COURT: Since I'm not imposing electronic  
24 monitoring, the reason why I'm not is because that is very  
25 expensive for the government. If he winds up fleeing, then I

1 will first of all be -- everything you've said about his  
2 character I will now know is false but more importantly is I'm  
3 sure the government will trace him down worldwide. It will be  
4 the end of his career and the end of his living a decent life.

5 So given all of that, Mr. Richman, if he is meeting  
6 personally with you or your daughter but no one else except  
7 upon prior authorization of the Court and if the meetings  
8 include no time other than the genuine travel time to your  
9 office, whatever time is spent in the office and then the  
10 return, you don't have to notify the Court in advance as to  
11 that. You do have to notify Pretrial Services.

12 MR. RICHMAN: Thank you, your Honor.

13 MR. MOSCADO: Your Honor?

14 THE COURT: Yes.

15 MR. MOSCADO: May I request or recommend that the  
16 condition of home incarceration be enforced with location  
17 monitoring?

18 THE COURT: OK. The only reason I wasn't imposing  
19 that is because I know it's a, I think the legal term is "pain  
20 in the butt" for you guys. But if you think this is an  
21 appropriate case I will include that. So we will include that  
22 as well.

23 MR. MOSCADO: Thank you.

24 MR. RICHMAN: Sorry. Including the Pretrial Services  
25 reporting?

1 THE COURT: Including electronic monitoring of his  
2 home confinement. So he'll wind up wearing an ankle bracelet  
3 or something of that sort.

4 MR. RICHMAN: The question was just posed to me that  
5 it had been suggested by the Pretrial Services officer to see a  
6 doctor or a program with relation to drug treatment. That will  
7 be continued with the Pretrial Services officer, I imagine?

8 THE COURT: Yes.

9 OK. Anything else?

10 MR. COOPER: Not from the government.

11 Thank you, your Honor.

12 MR. RICHMAN: Nothing from defense, your Honor.

13 Thank you.

14 THE COURT: All right. Very good.

15 (Adjourned)